



February 17, 2006

Via ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: **Waiver of Digital Testing Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004 -- MB Docket No. 05-317**
WNBC-DT, WJAR-DT, KTRK-DT, KOCO-DT

Dear Ms. Dortch,

EchoStar Satellite L.L.C. ("EchoStar") hereby:

- withdraws its opposition to the digital testing waiver request filed by WNBC-DT, WJAR-DT, and KTRK-DT;¹
- responds to certain statements in the reply submitted by KOCO-DT, which further corroborates the waiver applicant's failure to meet the statutory standard; and
- in light of recent press reports, clarifies the statutory test for waiver under the Satellite Home Viewer Extension and Reauthorization Act of 2004

¹ EchoStar's withdrawal is based on commercial reasons and is not an admission that the grounds for waiver were established in each case. In addition, EchoStar reserves the right to oppose the extension of any waiver granted to WNBC-DT, WJAR-DT or KTRK-DT in this proceeding.

(“SHVERA”). In brief, if any of the statutory requirements were not met, Congress has plainly required the Commission to deny the waiver. The burden is on the network station requesting a waiver to establish, on “clear and convincing evidence,” that its digital signal coverage is limited due to the “unremediable presence” of one or more statutory grounds for waiver.²

I. Withdrawal of Opposition to WNBC-DT, WJAR-DT and KTRK-DT

EchoStar is pleased to report that it has reached an agreement with NBC that moots EchoStar’s opposition to the waiver requests of NBC Telemundo License Co. with respect to WNBC-DT and WJAR-DT. Accordingly, EchoStar withdraws its opposition to those waiver requests. EchoStar also withdraws its opposition to the waiver request of KTRK, Inc.

II. Response to KOCO-DT, *Oklahoma City, Oklahoma*

In its reply, Ohio/Oklahoma Hearst-Argyle Television, Inc. (“Hearst”) states that “For KOCO-DT to operate at the 56.8 kW of power suggested by EchoStar, Hearst would have to procure a more powerful transmitter. SHVERA does not require such a frivolous and costly purchase.”³ In doing so, Hearst essentially admits that the “substantial decrease” in coverage area resulting from its use of side-mounted antennas was not “unremediable,” as required by SHVERA.⁴ It could have been remedied with the use of a more powerful transmitter, if only Hearst were willing to spend the money to do so. However, the statute makes clear that “[u]nder no circumstances may [a digital testing waiver] be based upon financial exigency.”⁵ Accordingly, KOCO-DT’s waiver request must be denied. As Congress has already determined, television viewers that cannot receive KOCO-DT’s digital signal over the air should not be denied the opportunity to obtain the distant signal of a station affiliated with the same network just because Hearst is unwilling to make the necessary investment in a more powerful transmitter. The FCC does not have discretion to change a statutory requirement.

² See 47 U.S.C. § 339(a)(2)(D)(viii); EchoStar Opposition at 2-3, *filed in* MB Docket No. 05-317 (filed Dec. 30, 2005).

³ Consolidated Reply of Hearst-Argyle Stations, Inc., Ohio/Oklahoma Hearst-Argyle Television, Inc., WAPT Hearst-Argyle Television, Inc. and WPBF-TV Company to the Opposition of EchoStar Satellite L.L.C., at 5, *filed in* MB Docket No. 05-317 (filed Jan. 17, 2006) (“Hearst Reply”).

⁴ 47 U.S.C. § 339(a)(2)(D)(viii).

⁵ 47 U.S.C. § 339(a)(2)(D)(viii).

III. The Commission Must Apply the Statutory Waiver Criteria

Given recent press reports,⁶ we are concerned that the FCC might be misreading the statute and inappropriately shifting the burden from the broadcast licensee to the waiver opponent. *First*, opponents to a waiver request *do not* in fact need to give the Commission a *public interest* reason why the request should be granted. Congress has already performed part of the public interest analysis here, and has concluded that the Commission may *not* grant a waiver if any of the statutory requirements were not met,⁷ without need for a public interest showing by waiver opponents. *Second*, such a statement incorrectly places on the opponent the burden to show why a waiver should not be granted. The statute clearly provides, however, that the burden is in fact on the network station to establish, on “clear and convincing evidence,” that its digital signal coverage is limited due to the “unremediable presence” of one or more statutory grounds for waiver.⁸

One copy of this letter is being filed in this docket via the Commission’s Electronic Comment Filing System. In addition, a copy of this filing is being served on the persons specified in the attached Certificate of Service.

Respectfully submitted,

/s/

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Attachment (Certificate of Service)

⁶ The trade press recently quoted an FCC official as stating: “Where there’s opposition, ‘we’ll certainly look at it,’ he said, adding: ‘You have to give us a public interest reason why the waivers shouldn’t be granted.’” Jonathan Make, *DBS, Broadcasters Square Off on DTV Tests; FCC Sees Action Soon*, COMM. DAILY, Jan. 11, 2006, at 7.

⁷ 47 U.S.C. § 339(a)(2)(D)(viii) (“The Commission *may only* grant such a request upon submission of clear and convincing evidence that the station’s digital signal coverage is limited due to the unremediable presence of one or more of the following”) (emphasis added).

⁸ 47 U.S.C. § 339(a)(2)(D)(viii). This is acknowledged in reply comments filed by the licensee of KOCO-DT. *See, e.g.,* Hearst Reply at 4 (“there is no presumptive right to obtain a waiver . . .”).

CERTIFICATE OF SERVICE

I, Desiree Grant, hereby certify that on February 17, 2006, I caused a true copy of the foregoing to be served by first-class mail (or by electronic mail where indicated by *) upon the following:

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